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Points of View

Opinion and Commentary

EXPLODING THE NRA'S CONSTITUTIONAL MYTH

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As gun violence in this country reaches unprecedented proportions, the perennial debate over the regulation of firearms is heating up again on Capitol Hill.

The current congressional focus is on the Brady bill--legislation named for James Brady, the former presidential press secretary wounded in John Hinckley Jr.'s attempt on President Ronald Reagan's life. The Brady bill would mandate a seven-day cooling-off period for handgun sales to allow local police to conduct background checks on prospective buyers. On March 28, 10 years after the Hinckley shooting, the Brady bill was endorsed by former President Reagan himself--a lifetime member of the National Rifle Association with a long record of opposition to federal gun laws. And earlier this month, the Bush administration started sounding more amenable to the principle reflected in the Brady bill.

Even so, it is impossible to predict the outcome of this legislative battle. One feature of the debate, however, is entirely predictable: the gun lobby's religious devotion to the idea that the Brady bill and other gun laws threaten our rights under the Second Amendment to the Constitution. In this respect, it is a reprise of the congressional debate last year over military-style assault weapons.

Last fall, the House of Representatives inserted a provision into the crime bill to protect the domestic assembly of foreign assault rifles--like the AK-47 used in the Stockton, Calif., schoolyard massacre--which President George Bush had already barred from importation. The NRA's congressional friends insisted the provision was needed to protect "the right of the people to keep and bear arms" under the Second Amendment.

Crumbling Bedrock

The Second Amendment argument is the bedrock of the NRA's opposition to every reasonable proposal to address the epidemic of violence victimizing our nation. Who hasn't seen Charlton Heston assure us that the NRA is fighting for our consti-

tutional rights?

What is peculiar about the gun-control debate is that this Second Amendment argument has acquired a political significance that bears no relationship to its legal validity. As a matter of law, the NRA's Second Amendment claims are insupportable.

Although the NRA maintains that the right guaranteed by the Second Amendment is as broad as the rights guaranteed by the First, the courts have noted a substantial difference in the language of the two provisions. Contrast the unqualified commands of the First Amendment--"Congress shall make no law . . . abridging the freedom of speech"--with the Second Amendment, in which the statement of right is preceded by an expression of purpose--"A well-regulated militia being necessary to the security of a free state, the right of the people to keep and bear arms shall not be infringed."

In [United States v. Miller, 307 U.S. 174, 178 \(1939\)](#)--a challenge to the National Firearms Act and the Supreme Court's fullest discussion of the Second Amendment--the Court held, not surprisingly, that the "obvious purpose" of the amendment was "to assure the continuation and render possible the effectiveness" of the state militia. The amendment, said the Court, "must be interpreted and applied with that end in view."

Since the modern "well-regulated militia" does not use privately owned firearms, courts since Miller have unanimously held that laws affecting such guns do not offend the Second Amendment. No federal court in history has overturned a gun law on Second Amendment grounds.

High Court Confirmation

This remarkable judicial consensus has twice been reaffirmed by the Supreme Court. In [Burton v. Sills, 394 U.S. 812 \(1968\)](#), the Court dismissed, for want of a substantial federal question, a gun owner's appeal of a New Jersey Supreme Court holding that the Second Amendment permits regulation of firearms "so long as the regulation does not impair the active, organized militias of the states." (As the Court has repeatedly made clear, a dismissal of an appeal, as in Burton, is a decision on the merits.)

More recently, in [Lewis v. United States, 445 U.S. 55 \(1980\)](#), the Court held that, for purposes of equal-protection analysis, legislative restrictions on the use of firearms do not "trench upon any constitutionally protected liberties." The Court cited Miller in support.

These decisions recognize that the Second Amendment differs from the First not only in language, but also in subject matter. Whereas the First Amendment addresses freedom of personal belief and expression, the Second Amendment addresses the distribution of military power in society. Many colonists strongly distrusted a standing army composed of professional soldiers and controlled by the central

government. They sought in the Bill of Rights a reaffirmation of the right of the states to have their own armed militia, composed of ordinary citizens, as a check on the power of the standing army. The concern of those seeking to amend the Constitution was, in George Mason's words, that "Congress may neglect to provide for arming and disciplining the militia: and the state governments cannot do it, for Congress has an exclusive right to arm them."

The first Congress could have adopted an amendment divorcing the right to be armed from the militia purpose. Indeed, the New Hampshire ratification convention had proposed that the Constitution be amended to read: "Congress shall never disarm any citizen unless such as, are, or have been in actual rebellion." Such language would have supported the NRA's position. It was not adopted.

Public Oblivion?

The NRA, therefore, has no valid argument that courts are torturing the original intent of the Second Amendment to adapt it to contemporary circumstances. The judicial interpretation of the amendment does not ignore the original intent, but rather enforces it.

Nevertheless, there continues to be a robust public debate about whether gun-control laws violate the Constitution--a debate that often seems oblivious to what the courts have said and what the Founders intended.

A recent illustration of the failure of Second Amendment law to penetrate the public consciousness is the reaction to the Supreme Court's denial in January of a petition for certiorari in *Farmer v. Higgins*. This was a suit brought by a Georgia machine-gun manufacturer, represented by the NRA's Firearms Civil Rights Legal Defense Fund, which sought to strike down the 1986 federal ban on possession of new machine guns as a violation of the Second Amendment. The U.S. Court of Appeals for the 11th Circuit had upheld the ban, thinking so little of the NRA's constitutional argument that the appellate court rejected it without comment.

Many in the press were puzzled at the Supreme Court's refusal to hear the NRA suit. If the Court is willing to face such controversial issues as affirmative action, abortion, and the death penalty, why will it not finally resolve the never-ending dispute over gun control and the meaning of the Second Amendment? This question is probably asked as often by gun-control supporters as it is by those opposed to stricter gun laws.

The Court's refusal to hear *Farmer* reflects not its unwillingness to tackle controversy, but rather the settled state of Second Amendment law. Further guidance from the high court is simply not needed. The controversy over the meaning of the Second Amendment exists only in the public debate over gun control: it does not exist in the law.

What we have, therefore, is a situation in which discussion of our national

policy toward crime and violence is dominated by a constitutional myth, an illusion created by mass advertising to advance a political objective. At a time when 19 American cities set new homicide records during the past year, we cannot afford to be guided by myths.

If the National Rifle Association and its friends in Congress want to argue against stronger gun laws on policy grounds, let them make the best case they can. Let them argue against a seven-day waiting period on the ground that avoiding "inconvenience" to handgun buyers is more important than saving lives. Let them make the case for laws allowing the sale of an AK-47, with a 30-round ammunition clip, to anyone who can pay the price. But let them no longer pretend that there is some fundamental constitutional liberty at stake. It's time to stop the Second Amendment nonsense.

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